

APR 26 2016

STATE OF ILLINOIS  
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

April 26, 2016

JOHNS MANVILLE,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 14-3
	)	(Enforcement)
ILLINOIS DEPARTMENT OF	)	
TRANSPORTATION,	)	
	)	
Respondent.	)	

 ORIGINAL

**HEARING OFFICER ORDER**

On February 8, 2016, the Illinois Department of Transportation (IDOT) filed two motions: a motion *in limine* to bar certain opinion testimony of Douglas G. Dorgan (Mot. to Bar Dorgan), and a motion *in limine* to bar introduction of certain statements made by former IDOT employee Duane Mapes (Mot. to Bar Mapes). Johns Manville (JM) also filed two motions on February 8, 2016. JM filed a motion *in limine* to bar IDOT from calling Steven Gobelman as a lay witness at hearing (Mot. to Bar Gobelman), and a motion to exclude Mr. Gobelman's opinion testimony (Mot. to Excl. Op. Test. Gobelman).

On February 16, 2016, IDOT filed its responses to JM's Mot. to Bar Mapes and JM's Mot. to Bar Gobelman. Also on February 16, JM filed its responses to IDOT's Mot. to Bar Dorgan and IDOT's Mot. to Bar Mapes.

This order first summarizes the filings regarding each motion and then provides my ruling on each motion.

**IDOT's MOTIONS**

**IDOT's Motion In Limine To Bar Opinion Testimony Of Douglas Dorgan**

**Summary of IDOT's Motion**

IDOT requests an order barring Mr. Dorgan from testifying at hearing about his disclosed opinions 3.2, 3.3 and 3.4. Mot. to Bar Dorgan. Mr. Dorgan's disclosed opinions include the proposition that IDOT's conduct was a violation of Section 21 of the Illinois Environmental Protection Act (Act), that the Illinois Environmental Protection Agency (Agency) "likely would view IDOT's conduct to be 'open dumping' under Section 3.305 of the Act," and that the Agency "would treat crushed and buried ACM as both 'solid waste' and 'hazardous waste.'" *Id.* at 2. IDOT argues that these opinions are legal conclusions that go to the ultimate issue before the Board and are therefore impermissible. *Id.*

IDOT next argues that opinions offered in section 3.2 of Mr. Dorgan's report go to the fundamental question in this case: how IDOT designed and constructed the highway project over forty years ago. *Id.* at 3. IDOT contends that Mr. Dorgan lacks the specialized knowledge, training or experience necessary to render an expert opinion and therefore his opinion must be barred. *Id.* at 3-5. Further, IDOT argues that Mr. Dorgan's opinions relating to the construction work should be barred because the opinion, in part, was based on another expert's opinion. *Id.* at 5. IDOT states that Mr. Dorgan indicated in his deposition that when reaching his opinions, he consulted with a colleague, Mr. Talbot, about construction-related issues. *Id.* at 6-7. IDOT argues that because Mr. Dorgan relied on another expert's opinion to form his own, Mr. Dorgan must be barred from testifying about those issues at hearing. *Id.* at 7-8.

Finally, IDOT seeks to bar Mr. Dorgan's opinions in sections 3.2 and 3.3 of his report because they are speculative, according to IDOT. *Id.* at 8. Specifically, Mr. Dorgan opined that remedial activities are more extensive because "IDOT used, spread, buried, placed and disposed of ACM waste, including Transite pipe, throughout Site 3 and portions of Site 6 during construction . . ." *Id.* IDOT argues that Mr. Dorgan's opinions must be barred because they "are based on nothing more than information provided to him by his colleague" and because they are speculative and unfounded. *Id.*

### **Summary of JM's Response**

JM responds that Mr. Dorgan's opinions do not speak to the ultimate issue in the case because "while IDOT's conduct is relevant to the ultimate question, the only ultimate question is whether JM, as a matter of law, has met its burden of proof." Resp. at 2. JM next argues that even if IDOT committed the alleged violations, "nowhere in the body of Mr. Dorgan's Expert Report does Mr. Dorgan ultimately conclude that IDOT violated the [Act]." Resp. at 3. Moreover, JM argues that opinion testimony describing "the conduct of IDOT in reference to specified rules, regulations and statutes" is permitted under Illinois Rules of Evidence 704. Resp. at 3-4.

JM next contends that Mr. Dorgan is qualified to provide the expert opinions in Section 3.2 of his report because of his education and work history, including environmental consultant at engineering firms. Resp. at 5-8. JM argues that Mr. Dorgan's opinions were not based on Mr. Talbot's opinions, and that Mr. Talbot only assisted Mr. Dorgan in reviewing figures. Finally, JM states that Mr. Dorgan's opinions are not speculative and are based on documentary evidence. Resp. at 11-13.

### **Discussion and Ruling**

Illinois Rules of Evidence 704 allows opinion testimony on the ultimate fact or issue that will be decided by the trier of fact. Expert opinion testimony is admitted to assist the Board in understanding the ultimate issue to be decided. *See Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 905 (2d Dist. 2007). A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision. *Thompson v. Gordon*, 221 Ill. 2d 414, 428-29

(Ill. 2006). An expert only needs to have knowledge and experience beyond the average citizen. *Id.*

I find that Mr. Dorgan may testify as an expert given his knowledge and experience, which go beyond that of an ordinary citizen and could consequently assist the Board in its determinations. Mr. Dorgan's assertions regarding the environmental concerns of this case do not amount to legal conclusions, but rather opinions as to the relationship between the facts of this case and applicable laws. Such testimony could conceivably aid the Board. Nor will his testimony encroach upon the Board's ultimate determination, although opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the Board. Ill. R. Evid. 704.

Further, even though Mr. Dorgan consulted with a colleague and had the colleague review Mr. Dorgan's report, the colleague's contribution was minimal and Mr. Dorgan represented that all of the opinions in his report are his own. Finally, Mr. Dorgan's opinions are not impermissibly speculative but based on documentary evidence in the record including a number of reports and manuals. Mr. Dorgan will be allowed to offer his disclosed opinions found in sections 3.2, 3.3 and 3.4 of his report.

IDOT's Motion *In Limine* to Bar Opinion Testimony of Douglas Dorgan is denied. IDOT, however, may renew its objection at hearing.

### **IDOT's Motion In Limine To Bar Introduction Of Certain Statements Made By Former IDOT Employee Duane Mapes**

#### **Summary of IDOT's Motion**

IDOT seeks an order barring JM from entering into evidence or eliciting testimony regarding statements former IDOT employee Duane Mapes made to former IDOT attorney J. Randall Schick. Mot. to Bar Mapes at 1-2. IDOT contends the statements are inadmissible hearsay. *Id.* at 2. IDOT further contends that the statements are not admissible as non-hearsay admissions of a party-opponent under Illinois Rule of Evidence 801(d)(2)(D) because the statements were not made while Mr. Mapes was an IDOT employee. *Id.* at 3.

#### **Summary of JM's Response**

JM contends that Mr. Mapes' statements are not hearsay under Illinois Rule of Evidence 801(d)(2) because IDOT "manifested an adoption or belief in the truth of Mr. Mapes' statements by transmitting them to the USEPA in IDOT's 104 (c) Response" Resp. at 3-4. Additionally, JM claims the statements are not hearsay under Illinois Rule of Evidence 801(d)(2)(C) because IDOT authorized Mr. Mapes to make the statements. *Id.*

JM also argues that even if the statements are hearsay, they fall within the hearsay exception under Illinois Rule of Evidence 803(8) and 804(b)(3). *Id.* at 4. JM contends that the public records exception under Rule 803(8) applies because IDOT's 104(e) CERCLA Response

was a public record setting forth IDOT activities related to matters observed during IDOT's work on the project that IDOT had a duty to report to the USEPA, and that nothing in the Response indicates a lack of trustworthiness. *Id.* at 5. JM further states that the hearsay exception under Rule 804(b)(3) applies because by making the statement, Mr. Mapes was subjecting himself to potential civil or criminal liability and therefore would not make the statement unless he believed it to be true. *Id.* at 6.

Further, JM argues that Mr. Mapes' statements are admissible under the Illinois Administrative Procedure Act because a "reasonably prudent man can and would rely upon the statements made in that 104(e) Response." *Id.* at 7, citing 5 ILCS 100/10-40 (2014); *see also* 35 Ill. Adm. Code 101.626(a). JM also maintains that the statements should not be barred because Illinois Rules of Evidence 703 and 705 allow an expert witness to rely on otherwise inadmissible statements in formulating an opinion and the expert must disclose the basis for his opinion. *Id.* Finally, JM contends that even if the statements are not admitted for the truth of the matter asserted, they should be admitted to explain the USEPA's investigatory procedure in arriving at its decision to order remedial work on Sites 3 and 6. *Id.* at 9.

### **Discussion and Ruling**

I find Mr. Mapes' statements admissible for a number of reasons cited by JM. For one, they are admissions by a party-opponent through an employee authorized to make statements to USEPA on behalf of IDOT. Beyond that, IDOT's 104(e) Response is a public record and admissible under the corresponding exception to the hearsay rule. Even in the event they are hearsay, I find them trustworthy and material and, having been included in IDOT's 104(e) Response, are the kind of information as would be relied upon by prudent persons in the conduct of serious affairs. *See* 35 Ill. Adm. Code 101.626(a).

IDOT's Motion *In Limine* to Bar Introduction of Certain Statements Made by Former IDOT Employee Duane Mapes is denied. IDOT, however, may renew its objection at hearing.

### **JM's Motions**

#### **JM's Motion To Exclude Opinion Testimony Of Steven Gobelman**

##### **Summary of JM's Motion**

JM seeks an order excluding opinion testimony from IDOT employee Steven Gobelman. JM first argues that after reviewing Mr. Gobelman's report and deposition, it was unable to discern "whether he has actually arrived at any 'opinions' and the bases for those opinions." Mot. to Excl. Op. Test. Gobelman. JM claims that rather than offering opinions, Mr. Gobelman is merely offering "commentary" on issues in this case. *Id.* at 7. JM argues that the statements must be excluded because it cannot identify any actual opinions, or the bases for any opinions, and IDOT failed to comply with the requirement under Supreme Court Rule 213(f) to disclose the "conclusions and opinions of the witness and the bases therefor." *Id.* at 7-9.

JM next argues that Mr. Gobelman lacks the knowledge, skill, experience, training or education required under Illinois Rules of Evidence 702 to testify as an expert on IDOT's historical and utility practices, JM's economic motivations, and USEPA's remedial strategy and decision making processes. *Id.* at 10-14. In particular, JM argues that in Comments 1-3 and 5-8 of his report, Mr. Gobelman makes comments regarding IDOT's historical practices as they relate to this case. *Id.* at 11. JM claims that he should not be allowed to offer such testimony because he reached his opinions without having any first-hand knowledge of IDOT's past practices, without studying sufficient examples of such practices, and without discussing such practices with any person that took part in past projects. *Id.* at 12.

JM next argues that in Comments 4 and 8-11 of his report, Mr. Gobelman similarly offered comments regarding utility practices, JM's economic motivations, and USEPA's decision making process without having the requisite knowledge or experience to be considered an expert on the topics. *Id.* at 13-14. Lastly, JM argues that Mr. Gobelman's opinions regarding IDOT's historical practices, utility practices, JM's economic motivations, and USEPA's deliberative process are based solely on speculation. *Id.* 15-21.

### **Summary of IDOT's Response**

IDOT contests JM's assertions and states that Mr. Gobelman's ample experience and qualifications make him qualified to offer all of his expert opinions in this case. *Resp.* at 6-13. IDOT also maintains that Mr. Gobelman's opinions are not speculative and are either based on his own knowledge and experience or other documents relevant to this case. *Id.*

### **Discussion and Ruling**

Applying the same standard and reasoning used in my ruling regarding Mr. Dorgan's testimony, I deny JM's motion.

While working for IDOT for over twenty years, Mr. Gobelman participated in the investigation and remediation of contaminated sites and also has examined the records of the project at issue in this case, along with the records of several other IDOT highway construction projects. IDOT has demonstrated that Mr. Gobelman has experience and knowledge of IDOT's historical practices, utility practices, economic considerations of remediation projects, and USEPA's concerns with contaminated property beyond that of an average citizen. Therefore, Mr. Gobelman may offer opinion testimony on these subjects as an expert witness.

Furthermore, after reviewing Mr. Gobelman's report and deposition testimony, I find that regardless of how Mr. Gobelman characterized his opinions, it is plain he did offer opinions and identified documentary evidence and experience on which they are based. Nor am I persuaded that Mr. Gobelman's testimony is speculative or that IDOT violated Supreme Court Rule 213(f)'s disclosure requirement.

JM's Motion to Exclude Opinion Testimony of Steven Gobelman is denied. JM, however, may renew its objection at hearing.

**JM's Motion In Limine To Bar IDOT From Calling Steven Gobelman As A Lay Witness  
At Hearing**

**Summary of JM's Motion**

JM seeks an order barring Mr. Gobelman from testifying as a lay witness. JM argues that IDOT did not disclose Mr. Gobelman as a fact witness in discovery and JM did not have the opportunity to depose him as a fact witness. Mot. to Bar Gobelman at 3. JM argues that if he is allowed to testify as a lay witness, the scope of Mr. Gobleman's testimony must be limited to discussing IDOT's Section 104(e) response. *Id.*

**Summary of IDOT's Response**

IDOT argues that Mr. Gobelman should not be barred from testifying as a lay witness because during his deposition, JM questioned Mr. Gobelman "extensively" and about matters beyond his expert opinions including but not limited to his involvement in IDOT's 104(e) Response. Resp. at 3-4. IDOT adds that Mr. Gobelman "may be the only living person" involved in the 104(e) Response. *Id.* at 3. IDOT adds that it properly identified Mr. Gobelman in response to an interrogatory about persons contacted in preparing the 104(e) Response. *Id.* at 1-2. Consequently, IDOT argues that JM will not be prejudiced or "harmed in any way" by Mr. Gobelman testifying as a lay witness. *Id.*

**Discussion and Ruling**

I find no basis for barring Mr. Gobelman from testifying as a lay witness, nor any reason to exclude lay testimony on subjects other than just IDOT's Section 104(e) Response. JM was not limited in the subjects it could explore in deposing Mr. Gobelman and clearly inquired into his knowledge of facts relating to the sites at issue and IDOT records. *See* Resp. at 3 & Exh. B. JM has not shown that it will be prejudiced if Mr. Gobelman testifies as a lay witness and on matters other than just IDOT's 104(e) Response.

JM's Motion *In Limine* To Bar IDOT From Calling Steven Gobelman As A Lay Witness At Hearing is denied. JM, however, may renew its objection at hearing.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

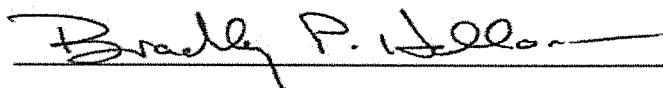
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## CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed and mailed, first class, on April 26, 2016, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 26, 2016:

John T. Therriault  
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A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran  
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@ Consents to electronic service



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